

Message Text

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FOR UNDER SECRETARY RICHARD N. COOPER FROM KATZ

E.O. 11652: N/A

TAGS: ETRD, JA, US

SUBJECT: BRIEFING MEMORANDUM -- ZENITH CASE

1. THE ISSUE BEFORE THE COURT OF CUSTOMS AND PATENT APPEALS (CCPA) IN THE ZENITH CASE WAS WHETHER THE CUSTOMS COURT HAD BEEN CORRECT IN RULING THAT, AS A MATTER OF LAW, THE NON-EXCESSIVE REMISSION OF AN EXCISE TAX SUCH AS THE JAPANESE COMMODITY TAX MUST BE DEEMED A BOUNTY OR GRANT UNDER U.S. COUNTERVAILING DUTY LEGISLATION BASED ON THE (897 TARIFF ACT. IN ITS RULING, THE CUSTOMS COURT HAD RELIED HEAVILY ON A 1903 SUPREME COURT CASE (DOWNS)
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CONCERNING RUSSIAN FORGIVENESS OF AN EXCISE TAX ON SUGAR EXPORTS. FOR 80 YEARS, TREASURY HAS MAINTAINED THAT THE NON-EXCESSIVE REBATE OF INDIRECT TAXES BY FOREIGN GOVERNMENTS IS NOT A BOUNTY OR GRANT SUBJECT TO COUNTERVAILING DUTIES UNDER U.S. LAW.

2. THE JULY 27 CCPA DECISION OVERTURNING THE LOWER COURT

RULING RESTS ON SEVERAL GROUNDS:

-- NOTHING IN THE COUNTERVAILING DUTY STATUTE, ITS LEGISLATIVE HISTORY, OR ANY PAST JUDICIAL DECISION, INCLUDING

DOWNES, REQUIRES THAT THE NON-EXCESSIVE REMISSION OF AN EXCISE TAX, BY ITSELF, BE DEEMED A BOUNTY OR GRANT AS A MATTER OF LAW.

-- CONGRESS HAS NEVER DEFINED SUCH TERMS AS "BOUNTY" AND "GRANT". IT IS THE ECONOMIC RESULT WHICH IS IMPORTANT IN DETERMINING WHETHER THERE IS A BOUNTY OR GRANT, AND THE COURTS MUST GENERALLY DEFER TO TREASURY EXPERTISE IN MAKING THE NECESSARY FACTUAL INQUIRY.

-- GREAT WEIGHT MUST BE GIVEN TO 80 YEARS OF UNIFORM AND CONSISTENT INTERPRETATION OF THE ACT BY THE TREASURY, ESPECIALLY SINCE CONGRESS, DESPITE KNOWLEDGE OF THIS INTERPRETATION, HAS NEVER ACTED AGAINST TREASURY'S PRACTICE. THE COURT STATED AS A FINAL CONCLUSION THAT "UNTIL LAWFULLY CHANGED, THE ADMINISTRATIVE PRACTICE OF THE TREASURY DEPARTMENT, IN UNIFORMLY CONSIDERING A NON-EXCESSIVE REMISSION OF AN EXCISE TAX AS FAILING TO CONSTITUTE A BOUNTY OR GRANT, MUST STAND AS A LAWFULLY PERMISSIBLE INTERPRETATION OF" THE COUNTERVAILING DUTY STATUTE.

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3. IN A STRONGLY WORDED DISSENT RESTING ALMOST EXCLUSIVELY ON DOWNES, TWO JUDGES CONTENDED THAT:

-- THE DOWNES DECISION HAD ESTABLISHED THAT THE REBATE OF INDIRECT TAXES IS A BOUNTY OR GRANT AS A MATTER OF U.S. LAW.

-- THE CONTINUED REENACTMENT OF THE STATUTE FOLLOWING ITS JUDICIAL INTERPRETATION (IN DOWNES) CREATES A PRESUMPTION OF CONGRESSIONAL APPROVAL OF THAT INTERPRETATION AND DOES NOT CONSTITUTE CONGRESSIONAL ACQUIESCENCE IN TREASURY'S ADMINISTRATIVE PRACTICES.

4. WE ARE GENERALLY PLEASED WITH THE MAJORITY OPINION, ESPECIALLY BECAUSE THE COURT ATTACHED GREAT WEIGHT BOTH TO TREASURY'S PRACTICE IN INTERPRETING THE STATUTE AND TREASURY'S FACTUAL DETERMINATION AS TO WHAT IS A BOUNTY OR GRANT. WE ARE PLEASED ALSO THAT THE COURT INFERRED CONGRESSIONAL ACQUIESCENCE IN TREASURY'S PRACTICES FROM THE FAILURE TO AMEND THE LAW. NO ONE, OF COURSE, CAN GUARANTEE THE RESULTS OF AN APPEAL TO THE SUPREME COURT, BUT WE ARE OPTIMISTIC THAT THE CCPA DECISION WILL STAND.

INDEED, WE BELIEVE THAT THE SUPREME COURT WILL PROBABLY
DECLINE EVEN TO TAKE THE CASE.

SINCE LIQUIDATION IS SUSPENDED UNTIL FINAL JUDGMENT IN THE
CASE, ZENITH IS EXPECTED TO DELAY ITS APPEAL UNTIL LATE

OCTOBER, WHEN THE 90-DAY PERIOD FOR FILING AN APPEAL
EXPIRES. IF ZENITH WAITS THAT LONG TO APPEAL, A DE-
CISION BY THE SUPREME COURT ON WHETHER TO TAKE THE CASE
COULD NOT BE EXPECTED UNTIL LATE 1977 OR EARLY 1978.
SHOULD THE SUPREME COURT DECLINE TO HEAR THE CASE, SUS-
PENSION OF LIQUIDATION WOULD END AT THAT TIME. SHOULD IT
TAKE THE CASE, SUSPENSION OF LIQUIDATION WOULD CONTINUE
UNTIL IT RENDERS ITS DECISION, PROBABLY NO EARLIER THAN
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